COURT OF APPEALS DECISION DATED AND FILED

January 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 98-2102-CR

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON G. KNAACK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Reversed and cause remanded with directions.*

DYKMAN, P.J.[1] Brandon Knaack appeals from a judgment of conviction for operating a motor vehicle after revocation, contrary to § 343.44(1), STATS. He contends that the trial court erred by refusing to suppress a statement that he gave to a jail guard and a deputy sheriff while he was incarcerated in the

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

La Crosse County Huber center. We agree. We therefore reverse and remand with instructions to suppress the statement and for further proceedings.

Knaack was serving a sentence in the La Crosse County Jail for operating a motor vehicle after revocation. He had been granted release, or "Huber" privileges, but he was not authorized to drive a motor vehicle, because his operating privileges had been revoked. The La Crosse County Sheriff's Department received a telephone call from an individual who had observed Knaack driving an automobile. A jailer later confronted Knaack with this information, and after some questioning, Knaack admitted that he had driven an automobile. Later, a jail supervisor, who was also a deputy sheriff, questioned Knaack and obtained the same information. Neither official gave Knaack the warnings required by ***Miranda v. Arizona***, 384 U.S. 486 (1966).

Knaack was charged with operating after revocation, a criminal offense because of Knaack's previous driving offenses. He moved to suppress the statements he had given to the two jailers, because neither advised him of his ***Miranda*** rights. The trial court denied Knaack's motion and he appeals.

Judicial Estoppel

The initial issue is whether Knaack was in custody for ***Miranda*** purposes when the jailers questioned him. The State contends that he was not. However, at Knaack's suppression motion hearing, the State informed the court, "Well, Your Honor, granted, the State concedes that Mr. Knaack both was in custody and was interrogated, obviously, by agents of the government…. However, I do think that suppression is not necessary at this point and not required by the law under [***Village of Menomonee Falls v. Kunz***, 126 Wis.2d 143, 376 N.W.2d 359 (Ct. App. 1985).]"

We recently addressed the criteria for judicial estoppel in ***Sea View Estates Beach Club, Inc. v. State***, No. 97-3418 (Wis. Ct. App. Nov. 18, 1998, ordered published Dec. 16, 1998). The doctrine of judicial estoppel generally bars a party from taking a position in a legal proceeding that is inconsistent with a subsequent position. ***Id.*** at 19. For judicial estoppel to apply, the later position must be inconsistent with the first, the facts at issue must be the same, and the party to be estopped must have convinced the first court to adopt its position–a litigant is not forever bound to a losing argument. ***Id.*** at 20.

There is little question that the State's positions are inconsistent, and that the facts here and in the trial court are the same. Whether the State convinced the trial court to adopt its position is a closer question. If we look at the State's position as requesting that the trial court deny Knaack's motion, it also is clearly doing so here. But in the trial court, the State asserted that the trial court should deny Knaack's motion because ***Kunz*** permitted or required that result. The trial court never really reached the question whether Knaack was in custody. It merely concluded, "I'm going to find that the ***Kunz*** rationale applies to this case and that this … was at least initially a non-criminal investigation that did not require the ***Miranda*** warnings to be given."

Still, the trial court was, at least, discouraged from considering whether Knaack was in custody by the State's concession. If the trial court does not make a finding, we may affirm if the trial court's conclusion is supported by evidence that it not clearly erroneous. *See* **Liddle v. Liddle**, 140 Wis.2d 132, 151, 410 N.W.2d 196, 204 (Ct. App. 1987). We recognize that the State's concession was made in argument on Knaack's motion, not at the beginning of the hearing. But in this case, the doctrine of judicial estoppel is closely related to a common appellate rule that a claim not raised in the trial court will not be considered here.

State v. Dean, 105 Wis.2d 390, 401-02, 314 N.W.2d 151, 157 (Ct. App. 1981). In ***Dean***, a defendant stipulated in the trial court that she had testified to "matters respecting which an oath was authorized by law" On appeal, she argued that the oath was not authorized or required by law. We declined to address this issue for the first time on appeal. ***Id.*** at 402, 314 N.W.2d at 157-58.

We conclude that the State should be judicially estopped from now asserting that Knaack was not in custody when it conceded to the trial court that he was in custody. Thus, we need not consider this issue.

Custody

Although we have concluded that the State should be estopped from arguing that Knaack was not in custody for ***Miranda*** purposes when he made incriminating statements, our decision would not change if we were to address it. The State relies upon ***U.S. v. Menzer***, 29 F.3d 1223 (7th Cir. 1994). In ***Menzer***, the court concluded that a statement taken from a defendant while he was in prison need not be suppressed, though the defendant was not given ***Miranda*** warnings. In part, this was factual, particularly the court's reliance on the fact that the government agents told the defendant that he was free to take a break, leave or terminate the interview. In part, the court's decision relied upon its conclusion that it would be illogical to provide greater protection to a prisoner than to his non-imprisoned counterpart. The ***Menzer*** court also distinguished ***Mathis v. United States***, 391 U.S. 1 (1968), by noting that the ***Mathis*** court did not expressly address the question of whether imprisonment *per se* constitutes being "in custody" for purposes of ***Miranda*** warnings.

The ***Menzer*** court only discussed the majority opinion in ***Mathis***, and it is fair to say that the majority opinion did not directly discuss the issue of whether ***Mathis*** was "in custody" because he was in prison. It is also a fair reading of ***Mathis*** that the majority assumed that the defendant was in custody for the purposes of ***Miranda***. That reading of the majority opinion was accepted by the dissent, which wrote:

> The Court is equally cavalier in concluding that petitioner was "in custody" in the sense in which that phrase was used in ***Miranda***. The State of Florida was confining petitioner at the time he answered Agent Lawless' questions. But ***Miranda*** rested not on the mere fact of physical restriction but on a conclusion that coercion—pressure to answer questions—usually flows from a certain type of custody, police station interrogation of someone charged with or suspected of a crime. Although petitioner was confined, he was at the time of interrogation in familiar surroundings.

Had the dissent in ***Mathis*** mischaracterized the majority's holding as to its interpretation of ***Miranda***'s "in custody" requirement, we would usually see mention of that in the majority opinion. An overall reading of both opinions in ***Mathis*** leads us to differ with the Seventh Circuit that ***Mathis*** should not be read as holding that persons in prison are not necessarily "in custody" for purposes of ***Miranda.*** We read ***Mathis*** as concluding that they are.

We have recently discussed what is necessary before a person is "in custody" for ***Miranda's*** purposes in ***State v. Mosher***, 221 Wis.2d 203, 584 N.W.2d 553 (Ct. App. 1998). In ***Mosher***, we used a "totality of the circumstances" test and concluded that the ultimate question is whether a reasonable person in the suspect's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances. *See* ***id.*** at 210, 584 N.W.2d at 557. We have identified a number of relevant factors to use in making that determination such as the presence or absence of guns, handcuffs, police vehicles and the like. *See* ***id.*** These factors are not as helpful when the setting of the interrogation is in a prison or a jail. Answering the ultimate question, and recognizing that reasonable persons may be difficult to find among a jail or a prison's inmates, we conclude that a reasonable person in jail or prison would without much doubt consider himself or herself "in custody."

Thus, if the State wishes to use the results of an interrogation to convict a prisoner of a crime, the State's agents must give ***Miranda*** warnings or run the risk that any incriminating information obtained in the interrogation will be suppressed. We do not agree with the ***Mathis*** court's conclusion that requiring ***Miranda*** warnings in prison would totally disrupt prison administration. ***Mathis***, 29 F.3d at 1231.

We see significant numbers of prison disciplinary proceedings, but only a very few criminal cases arising in prisons. Few prison cases, criminal or not, are built on the results of interrogation. We also do not agree that applying ***Miranda*** in prisons and jails for this limited purpose would give prisoners greater rights than non-incarcerated persons. ***Miranda*** focuses on coercion. If prison life is inherently coercive, then that is where ***Miranda*** should be applied. Both incarcerated and non-incarcerated persons should be equally free from coercive police interrogation. Knaack was in custody when he was interrogated without first being given ***Miranda*** warnings. Accordingly, if the questioning of Knaack constituted interrogation, then the next question we address is whether the trial court should have suppressed any incriminating statements which he gave to the jailers.

Interrogation[2]

The State argues that Knaack was not interrogated because the first jailer did not know whether the result of his questions would be an admission to a crime. This is not the test. In ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980), the court defined what is meant by "interrogation" for the purposes of ***Miranda***:

> [T]he term "interrogation" under ***Miranda*** refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

(Footnotes omitted.)

Thus, what the first jailer actually knew or did not know is irrelevant. The first jailer should have known that because Knaack was in jail for operating a motor vehicle without a driver's license, further incidents of driving would likely be criminal. Thus, his questions about whether Knaack was driving were reasonably likely to elicit an incriminating response from Knaack.

The State asserts that the second jailer did not "interrogate" Knaack because this was an administrative hearing, and all that he said, after telling Knaack of the information that he had received from the first jailer was, "Okay, it's your turn now." These factors are likewise irrelevant. The question is whether it was reasonably likely that after reading Knaack the first jailer's report, including

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[2] We conclude that the State is judicially estopped from now arguing that Knaack was not interrogated when it conceded at the suppression motion hearing that Knaack was interrogated. But we conclude that if we were to address this issue, the result would not change.

Knaack's confession that he operated a motor vehicle, and telling Knaack that he could speak now, Knaack would make an incriminating response. An incriminating response was indeed reasonably likely. The second jailer also interrogated Knaack for the purposes of ***Miranda***.

"Evans" Rule

Knaack argues that his situation is analogous to that of a probationer questioned by a probation agent, and thus subject to ***Miranda*** requirements as required by ***State v. Evans,*** 77 Wis.2d 225, 252 N.W.2d 664 (1977). The State disputes this, asserting that the differences between jailers and probation agents make this analogy imperfect. We need not address these assertions because we have already concluded that Knaack's statements should be suppressed due to the jailers' failure to give ***Miranda*** warnings.

"Kunz" Rule

The State relies on ***Kunz*** to support its assertion that ***Miranda*** does not apply in this case, because the jailers were investigating a violation of jail rules, not a criminal matter. We have already decided that the test for "interrogation" is whether the jailers' questions or comments would be reasonably likely to result in an incriminating response. Thus, the purpose of the investigation is irrelevant. This is consistent with ***Kunz***. In ***Kunz***, we said:

> Kunz further argues that the delivery of the ***Miranda*** warnings is required because the officer does not know at the outset of the encounter whether the ultimate prosecution will assume civil or criminal proportions. *However, failure to give the requisite warnings will result in loss of evidence if the ultimate prosecution is a criminal action and a* ***Miranda*** *situation is present. This should serve as sufficient impetus to the police authorities to deliver* ***Miranda*** *warnings on a routine basis.*

Kunz, 126 Wis.2d at 148, 376 N.W.2d at 362 (emphasis added).

Conclusion

We conclude that Knaack was subjected to a custodial interrogation when he was asked whether he operated a motor vehicle after revocation. It was reasonably likely that the questions and comments of the two jailers would produce an incriminating response. Since Knaack's ultimate prosecution was criminal, ***Miranda*** applied, and his incriminating responses should have been suppressed. We therefore reverse the trial court's judgment of conviction and remand for proceedings consistent with this opinion.

By the court.—Judgment reversed and cause remanded with directions

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.